amount, and that the tax shall be computed on the basis of the capital and surplus. *Held*, That the word "surplus" includes the entire overplus of assets over liabilities, without regard to the fact that a portion thereof has been set aside by the officers of the bank as a sort of reserved additional capital. *Leather Mfrs. Nat. Bank* v. *Treat* (C. C.), 116 Fed. 774.

Per Lacombe, Circuit Judge:

"If this section of the war revenue law dealt only with national banks, there would be much force in the argument that Congress must be assumed to have used the word 'surplus' with the same meaning as in the earlier acts specially relating to such banks. But when this section was passed, imposing a tax upon capital employed in banking, including surplus, the attention of Congress was not confined to national banks, as may be seen from the careful enumeration of individuals affected by its provisions. It can hardly be assumed that Congress used the word in this section intending that it should mean one thing when applied to a national bank and another thing when applied to a banking firm. Nor does it seem reasonable to hold that Congress intended to require every one engaged in the banking business, except national banks, to pay tax on the entire excess of assets over liabilities, while those corporations were required to pay only on part of such excess. And it would seem absurd to hold, though it seems to be a natural corollary from the propositions advanced by plaintiff, that a board of directors could set aside large sums each year from the profits, accumulating an additional fund equal perhaps to the capital, and used in the same way, and escape the tax upon it by the simple device of calling it 'undivided profits.' It would seem, rather, that Congress used the word 'surplus' in its ordinary sense, as indicating the amount left over after setting aside sufficient of the assets of a banker to meet his liabilities."

This decision settles, as far as it goes, a vexed controversy of some years' standing between the banks and the Internal Revenue Department.

EMINENT DOMAIN—MUNICIPAL CORPORATIONS—PRIVATE CORPORATIONS.—A water supply system belonging to a private corporation may be acquired by the public on payment of just compensation, and the facts that the water company has issued its bonds and mortgaged its property to secure them, and has also assumed fixed permanent obligations to certain municipalities to supply them with water, do not exempt its property and franchise from the power of eminent domain. These are mere incidents, to be considered in the appraisal. *Kennebec Water District* v. *City of Waterville* (Me.), 52 Atl. 774. Citing *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685; *Bridge Co.* v. *Dix*, 6 How. 507, 12 L. Ed. 535; *Boston & L. R. Corp.* v. *Salem & L. R. Co.*, 2 Gray, 1; *Enfield Tollbridge Co.* v. *Hartford & N. H. R. Co.*, 17 Conn. 454, 466, 44 Am. Dec. 556; *White River Turnpike Co.* v. *Vermont Cent. R. Co.*, 21 Vt. 590; *Brainard* v. *Railroad Co.*, 48 Vt. 107; *In Re City of Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; *Backus* v. *Lebanon*, 11 N. H. 19, 49 Am. Dec. 139.

Per Folger, J:

"The power of eminent domain is not created by constitution or statute.

It is an inherent attribute of sovereignty. It existed in the sovereign long before the adoption of any constitution. The article in our bill of rights (article 1, sec. 21), declaring that 'private property shall not be taken for public uses without just compensation; nor unless public exigencies require it,' does not confer the power, but by implication recognizes it as existing in the State.

"The sovereign power of the State, by which is meant the people of the State in their sovereign capacity, acting through their representatives, the legislature, possesses and has the right to exercise the great power of eminent domain over all the private property and property rights within the limits of the State, of whatever nature, corporeal or incorporeal, and by whomsoever owned—whether by individuals or corporations. The property of a corporation is not exempt from the exercise of this power, even though it may have been granted exclusive franchises and privileges. A legislature, in granting a charter, cannot, even by express terms, however strong may be the language used, preclude another legislature, or even itself, from exercising the sovereign power of eminent domain over the charter thus granted, and the property and rights acquired thereunder. The legislature cannot barter away the sovereign power of the State. All grants by the State, whether of property or rights or franchises, are subject to this power."

Cf. *James River & K. Co.* v. *Thompson*, 3 Gratt. 270; *Tuckahoe Canal Co.* v. *R. R. Co.*, 11 Leigh. 42; *James R. & K. Canal Co.* v. *Anderson*, 12 Leigh, 278; *Postal Tel. etc. Co.* v. *N. & W. R. Co.*, 88 Va. 920.

MALICIOUS PROSECUTION—COMPROMISE OF PREVIOUS PROCEEDINGS.—In an action for malicious prosecution, defendant proved the entry in the record of the criminal proceeding of a stipulation and agreement between the parties for a discontinuance. The trial court thereupon directed a verdict for the defendant. *Held*, Not error. *Russell* v. *Morgan* (R. I.) 52 Atl. 808.

In reply to the contention of plaintiff that the discontinuance was not brought about by him, but that he simply acquiesced therein, Tillinghast, J., said:

"We do not think the plaintiff had any right to prove that he merely acquiesced in said agreement for discontinuance, as such proof would have tended to vary and contradict the same. And that an agreement in writing cannot be varied by parol evidence is familiar law. Taking said agreement as it reads, the fair and natural meaning thereof is that the parties thereto had mutually consented that the cases referred to therein should be dropped and ended. And there is as much to show that the plaintiff was an active party in the premises as were the defendants.

"It is reasonable to infer that a compromise of some sort was affected between the parties, whereby the criminal proceedings which had been instituted were to be abandoned. And this being so, to now allow the plaintiff to maintain his action would be, in effect, to permit him to violate his written agreement after accepting the benefit arising therefrom. The case